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International Environmental Protection After the GATT Tuna Decision: a Proposal for a United States Reply*

I. INTRODUCTION

A recent international trade panel decision highlights concerns regarding whether United States environmental protection laws conflict with international free trade agreements.¹ The panel held that the United States' ban on the importation of tuna captured by purse-seine nets in international waters violated the General Agreement on Tariffs and Trade (GATT).² Environmentalists objected to the decision, claiming that it could "accelerate environmental degradation and undermine national and international efforts to address ecological problems."³

The relationship between the issues of environmental protection and international trade has been receiving increased attention recently. In June 1992, representatives from more than 170 nations attended the Earth Summit in Brazil to "plan for a world economy that can continue to grow without irreversible ecological damage."⁴

Recently proposed laws in the United States Congress attempt to

* First Place, 1992 Stanley I. and Hope S. Adelstein Environmental Law Award, Case Western Reserve University School of Law.

¹ General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, August 16, 1990, 30 I.L.M. 1594 [hereinafter Tuna Panel Report].

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 (entered into force Jan. 1, 1948). See General Agreement on Tariffs and Trade, 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1-78 (1969) [hereinafter GATT].

³ John Hunt, *Free Traders Heading for Clash with Greens*, FIN. TIMES, Sept. 5, 1991, at 16. See also Stuart Auerbach, *Raising a Roar Over a Ruling: Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991, at D1 (discussing American environmentalists' concerns about whether United States laws protecting endangered species are permissible under the GATT).

⁴ Paul Lewis, *U.S. Under Fire In Talks at U.N. On Environment: Poor Nations Ask Help to Cut Gas Emissions*, N.Y. TIMES, March 24, 1992, at A1. See also David Dowdell, *Trade and the Environment; GATT Issues Warning Against Environmental Imperialism*, FIN. TIMES, Feb. 12 1992, at Section I3; Hunt, *supra* note 3. For the results of the Earth Summit, see *infra* note 31.

address these two issues.⁵ One bill, the International Pollution Deterrence Act of 1991 (IPDA),⁶ would impose a duty upon products imported into the United States from countries that failed "to impose and enforce effective pollution controls and environmental safeguards."⁷ Although the IPDA addresses environmental protection, a GATT panel could rule that because nations have no international legal obligation to adopt environmental protection standards similar to those of the United States, the IPDA would constitute a barrier to trade which conflicts with the GATT.

This Note proposes a different method of environmental protection which would be permissible under the GATT. Rather than attempting to hold foreign nations accountable to United States environmental protection standards, the United States should hold foreign manufacturers accountable to United States standards, regardless of the manufacturers' nationalities. This Note proposes a framework for amending the Clean Air Act⁸ which would require foreign manufacturers to comply with similar air quality standards as domestic manufacturers. If a foreign manufacturer violated the proposed Amended Clean Air Act, the United States would be able to assess a civil penalty upon the manufacturer's imported products.

In Part II, this Note discusses ozone depletion and the foundations of international environmental law.⁹ Ozone depletion demonstrates that the effects of pollution are not confined to the nation causing the pollution. The global impact of ozone depletion and other forms of pollution require each nation to ensure that activity within its jurisdiction does not pollute the environments of other nations. Part III demonstrates that the IPDA is an unfair barrier to international trade which conflicts with the GATT.¹⁰ In Part IV, the Note describes the proposed Amendments to the Clean Air Act and reviews the GATT panel ruling regarding the United States ban on the importation of tuna captured in purse-seine nets in international waters.¹¹ The Note demonstrates that the Amended Clean Air Act would not violate international law and is permissible under the GATT.

⁵ See, e.g., Global Environmental Protection and Trade Equity Act, S. 2887, 101st Cong., 2d Sess. (1990) (linking trade benefits to a series of pollution control standards).

⁶ International Pollution Deterrence Act of 1991, S. 984, 102nd Cong., 1st Sess. (1991) [hereinafter IPDA].

⁷ *Id.* § 3(a) & (b).

⁸ Clean Air Act, 42 U.S.C. §§ 7401-7671q (1989 & Supp. 1992).

⁹ See *infra* text accompanying notes 12-45.

¹⁰ See *infra* text accompanying notes 46-72.

¹¹ See *infra* text accompanying notes 73-118.

II. THE MONTREAL PROTOCOL AND OTHER FOUNDATIONS OF INTERNATIONAL ENVIRONMENTAL LAW

A. *Pollution Does Not Recognize National Borders*

Ozone depletion demonstrates the first principle of international environmental law: pollution does not recognize the artificial borders drawn by countries. Currently, ozone depletion is the only environmental threat for which there are international standards to which almost every nation has an obligation to comply.

In 1928, chemists at General Motors developed the extremely stable and long-lived gaseous substance, chlorofluorocarbon (CFC).¹² CFCs are used as propellants for aerosol sprays, cleansers for electronic parts and coolants for refrigerators and air conditioners.¹³ Because of their stability and longevity, CFCs were praised as technological triumphs.¹⁴

Not everyone was praising CFCs, however. In 1974, two chemists at the University of California, Irvine, published an article sounding a warning that CFCs destroy atmospheric ozone.¹⁵ According to the chemists, when CFCs are released into the atmosphere, they break down and release chlorine atoms.¹⁶ The chlorine destroys the ozone molecules in the stratosphere and transforms them into simple two-atom oxygen molecules, which do not absorb the sun's ultraviolet rays.¹⁷ Chlorine atoms can remain in the atmosphere for over a century and react with more ozone molecules spread over vast areas, continuing the transformation process.¹⁸ The result of these reactions, duplicated thousands of times, is "an ozone *danse macabre* in which just one chlorine atom may be responsible for the demise of many ozone molecules."¹⁹

¹² Michael D. Lemonick, *The Heat Is On: Chemical Wastes Spewed into the Air Threaten the Earth's Climate*, TIME, Oct. 19, 1987, at 58.

¹³ Richard S. Stolarski, *The Antarctic Ozone Hole*, 258 SCI. AM. 30, 31 (1988).

¹⁴ David D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking*, 14 HASTINGS INT'L & COMP. L. REV. 755, 756 (1991).

¹⁵ Mario J. Molina & F.S. Rowland, *Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom-catalysed Destruction of the Ozone*, 249 NATURE 810 (1974). Ozone is an oxygen molecule composed of three oxygen atoms. Stolarski, *supra* note 13, at 30. It absorbs most of the sun's ultraviolet rays, preventing them from reaching the earth. *Id.* If these ultraviolet rays were to reach the earth, they could cause eye cataracts, skin cancer, immune deficiencies, and could harm crops and aquatic systems. *Id.*

¹⁶ Molina, *supra* note 15, at 810.

¹⁷ *Id.*

¹⁸ Stolarski, *supra* note 13, at 32-33.

¹⁹ John W. Kindt & Samuel P. Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L.J. 261, 265 (1989).

One of the University of California chemists commented that, "[f]or every chlorine atom [released], . . . 100,000 molecules of ozone are removed from the atmosphere."²⁰

The continued depletion in the ozone poses a global environmental threat. In the late 1980s, a majority of the world's nations gathered in Montreal, Canada to address this threat. Out of that meeting came the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).²¹ Over sixty countries signed and ratified the Montreal Protocol,²² which sets limits on the consumption and production of CFCs by the Protocol's signatories.²³ Richard Benedick, one of the United States negotiators of the Montreal Protocol, said it was truly a unique accomplishment because the Protocol was originally believed to be an impossible achievement due to the complex issues and widely divergent initial positions of the parties.²⁴

In addition to ozone depletion, other forms of pollution continue to threaten the global environment. In 1987, the World Commission on Environment and Development reported to the United Nations that:

"environmental trends . . . threaten to radically alter the planet, . . . [and] the lives of many species upon it, including the human species." . . . [T]hese trends . . . includ[e] desertification, deforestation, acid deposition, global warming (the "greenhouse effect") caused by the burning of fossil fuels, depletion of the ozone layer by other industrial gases, and the introduction of toxic substances into the human food chain and underground water tables.²⁵

Besides the Montreal Protocol, several international agreements recognize that pollution does not stop at a national borders. The Organisation for Economic Co-operation and Development, a group of industrialized countries including the United States, most of Europe and Japan, acknowledged this fact in one of its recommendations on protect-

²⁰ Lemonick, *supra* note 12, at 60 (quoting F.S. Rowland).

²¹ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

²² For a complete list of countries that have signed and ratified the Montreal Protocol as of August 2, 1990, see RICHARD E. BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET*, 265-269 (1991).

²³ Montreal Protocol, *supra* note 21, art. 2, at 1552.

²⁴ BENEDICK, *supra* note 22, at 1.

²⁵ Stephen C. McCaffrey, *International Liability and International Watercourses: The Work of the International Law Commission Relating to International Pollution*, in INT'L L. & POLLUTION 90, 90 (Daniel B. Magraw ed., 1991) (citing WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 2-3 (1987), also published as U.N. Doc. A/42/427/Annex (1987)).

ing the global environment. This recommendation states: "'Transfrontier pollution' means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under the national jurisdiction of one country and which has effects in the area under the national jurisdiction of another Country."²⁶

The 1979 Geneva Convention on Long-Range Transboundary Air Pollution includes a provision recognizing the global nature of air pollution:

"[L]ong-range transboundary air pollution" means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.²⁷

In 1985, the Hague Academy of International Law developed principles for addressing the problem of transboundary pollution which include recognizing the international attributes of pollution:

The term "pollution" means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of a nature to endanger the human health, living resources and ecosystems, deteriorate natural properties, and impair or interfere with amenities and other legitimate uses of the environment.

The expression "transfrontier pollution" means, unless otherwise indicated, any pollution which, provoked by activities conducted in the territory or under the control of one State, produces effects deleterious to the environment in other States or in areas beyond the limits of any national jurisdiction.²⁸

Prior to the Montreal Protocol, international environmental law consisted merely of broad policy statements²⁹ or regional agree-

²⁶ Council Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, Organization for Economic Cooperation and Development, 42nd mtg., Annex, O.E.C.D. Doc. C(77)28(Final), *reprinted in* 16 I.L.M. 977, 978 (1977).

²⁷ Geneva Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, art. 1(b), 34 U.S.T. 3043, 3046, 1302 U.N.T.S. 217,219.

²⁸ Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law, *Corpus of Principles and Rules Relative to the Protection of the Environment against Transfrontier Pollution Established by the French-Speaking Section*, art. I, in TRANSFRONTIER POLLUTION & INT'L L. 27, 27 (1986) [hereinafter HAGUE ACADEMY].

²⁹ See, e.g., Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Principle 21, DEP'T ST. BULL., July 24, 1972, at 116, 118, June 16, 1972, 11 I.L.M.

ents.³⁰ The Montreal Protocol added substance to the principles of this newly emerging legal field. The Montreal Protocol is the first, and so far only, multilateral non-regional international environmental agreement which sets environmental standards for its signatories.³¹

B. *The Obligation to Avoid Polluting Other Nations*

1. *The Trail Smelter Principle*

Besides the principle that pollution does not recognize the artificial boundaries drawn by nations, another important general principle of international law, drawn from international adjudications and agreements, is that no nation has the sovereign right to pollute the air of another nation. This principle dates back to the *Trail Smelter* case,³² a pre-World War II arbitral decision regarding sulfur dioxide emissions from a Canadian zinc and lead smelter near the United States border. The United States presented its claim to Canada on behalf of farmers in the state of Washington whose property and crops had been damaged by the emissions from the smelter. The two countries agreed to submit the matter to arbitration.

The arbitral tribunal held that Canada was liable to the American farmers for the damage caused by the smelter.³³ In its decision, the tribunal laid down the first legal principle of international environmental law:

no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.³⁴

1416, 1420, reprinted in U.N. Doc. A/CONF.48/14/Rev. 1 (1973) [hereinafter Stockholm Declaration].

³⁰ See, e.g., Agreement Between the United States of America and Canada on Great Lakes Water Quality, Apr. 15, 1972, 15 U.S.T. 301.

³¹ The only document at the 1992 Earth Summit in Brazil which the United States signed was the United Nations Framework Convention on Climate Change. As of September 1992, the United States Senate has not yet ratified it. The Framework Convention, unlike the Montreal Protocol, provides only broad policy statements regarding international environmental protection. It fails to provide numeric environmental standards. United Nations Framework Convention on Climate Change, May 9, 1992 (on file with the *Case Western Reserve Journal of International Law*).

³² *Trail Smelter Case* (U.S. v. Can.), *Trail Smelter Arbitral Tribunal*, 3 R.I.A.A. 1905 (1941).

³³ *Id.* at 1965-1966.

³⁴ *Id.* at 1965.

The International Court of Justice used this holding as a guiding principle when it decided the *Corfu Channel* case in 1949.³⁵ The Court found Albania liable to Great Britain for damage incurred by a British ship when it was struck by an Albanian-laid mine.³⁶ Liability arose from the fact that Albania did not warn Great Britain or the British ship that Albanian territorial waters were mined.³⁷ Expanding the *Trail Smelter* principle, the Court held that every State has the obligation "not to knowingly allow its territory to be used for acts contrary to the rights of other States."³⁸ This holding would preclude a nation from knowingly permitting pollution to emit within its jurisdiction that would effect the environment of another nation.

The *Trail Smelter* principle was applied by another arbitral tribunal in the 1957 *Lake Lanoux* case.³⁹ In this case, French public works threatened to pollute water which flowed into Spain. In its holding, the Tribunal employed the principle that "[t]here is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State."⁴⁰

These precedents point towards a general principle that no nation has the sovereign right to pollute the air or water of another nation. Although international law does not use a system of binding precedents to decide a case, the precedent set by these cases could be used persuasively.

2. International Agreements

In addition to international adjudications, United Nations agreements and resolutions also establish this general principle of international environmental responsibility. In 1972, the Stockholm Declaration on the Human Environment asserted, "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."⁴¹

³⁵ *Corfu Channel Case* (Gr. Brit. v. Alb.), 1949 I.C.J. 4 (Apr. 9). For an accurate summation of the case, see SECTION OF INTERNATIONAL LAW, A.B.A., INTERNATIONAL COURT OF JUSTICE OPINION BRIEFS 1-1 to 1-3 (1978) [hereinafter A.B.A.].

³⁶ A.B.A., *supra* note 35, at 1-2.

³⁷ *Id.*

³⁸ *Corfu Channel Case*, 1949 I.C.J. at 22.

³⁹ *Lake Lanoux Case* (Fr. v. Spain), 24 I.L.R. 101 (1957), *reprinted in* 53 AM. J. INT'L L. 156 (1959).

⁴⁰ *Id.*, 24 I.L.R. at 140.

⁴¹ Stockholm Declaration, *supra* note 29, Principle 21, at 118.

The Hague Academy of International Law also recognizes this responsibility in its principles on international environmental law.

- In the exercise of their sovereign rights to exploit and use their natural resources pursuant to their development policies States take into account the impact of actual or anticipated activities in areas placed under their jurisdiction, on the environment situated beyond national frontiers. They take, in good faith and with due diligence, appropriate measures to prevent transfrontier pollution by elaborating, in particular, rules and procedures adapted to the requirements of the production of the environment, and see to it that these are effectively applied.⁴²

The United Nations maintains this concept of transnational responsibility. A recent General Assembly resolution

reaffirms that States have . . . [the] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and the need to play their due role in preserving and protecting the global environment in accordance with their capacities and specific responsibilities.⁴³

Currently, the United Nations International Law Commission is attempting to codify and develop the nations' responsibility for transnational and international pollution.⁴⁴ The Commission recognizes that a polluting state has obligations towards other States affected by the pollution through tort liability.⁴⁵

These international agreements and judicial cases establish that nations have the responsibility and duty to ensure that activities within their control or jurisdiction do not cause environmental harm to other nations. The current state of international environmental law recognizes the two principles that pollution poses a global threat and that nations have the affirmative duty to not pollute other nations. If a nation were to unilaterally impose environmental protection regulations, consistent with international law, which required another nation's compliance, the regulations must either be within the framework of these two principles in order to be consistent with international law, or the nation must obtain the consent of the regulated nation.

⁴² HAGUE ACADEMY, *supra* note 28, art. II, at 27.

⁴³ *General Assembly Resolution on Protection of the Global Climate for Present and Future Generations of Mankind*, U.N. GAOR 2d Comm., 44th Sess., Agenda Item 85, U.N. Doc. A/Res/44/207 (1989), reprinted in 20 ENVTL. POL'Y & L. 43, 44 (1990).

⁴⁴ McCaffrey, *supra* note 25, at 91.

⁴⁵ *Id.* at 93-95.

III. THE INTERNATIONAL POLLUTION DETERRENCE ACT AND THE GATT

A. *The International Pollution Deterrence Act*

Rather than addressing only foreign nations' responsibilities to control transnational pollution, the International Pollution Deterrence Act (IPDA),⁴⁶ proposed in the United States Senate, addresses the concerns of American industries that compliance with strict United States environmental protection standards damages the ability of United States companies to compete globally.⁴⁷

Recent surveys demonstrate that the United States business community's concerns are not unfounded. In 1990, the United States Environmental Protection Agency (EPA) issued a report stating that pollution control expenditures were higher in the United States than in many Western European countries.⁴⁸ In 1985, the percentage of the United States' gross domestic product expenditures on pollution control was up to 76 percent higher than such expenditures in Finland, France, the Netherlands, Norway and the United Kingdom.⁴⁹ If expenditures for pollution control is indicative of a nation's concern for environmental protection, then it would necessarily follow that other countries do not believe that environmental protection is as important as the United States does.

One of the Congressional findings of the bill is that the United States alone cannot halt the global threat to the environment. It states that "solely by its own efforts . . . the United States cannot halt the continuing and, in many cases, irreversible damage to the world's ecosystems caused by other countries' failure to shoulder their part of the burden of protecting the global environment."⁵⁰ Furthermore, the bill

⁴⁶ IPDA, *supra* note 6.

⁴⁷ See, e.g., William S. Ferguson, Note, *International Trade Implications of Pollution Control*, 58 CORNELL L. REV. 368 (1973). Funds which could be spent for modernization and expansion are channeled instead to the purchase and maintenance of pollution control equipment. *Id.*; OSHA, *EPA Regulations Contributed to U.S. Productivity Slowdown, Study Says*, Daily Lab. Rep. (BNA) No. 176, at A-9 (Sept. 11, 1991) (claiming that "the effect of regulatory enforcement, combined with industry's focus on regulations and compliance rather than profits and productivity, are the major factors in declining productivity evidenced by less competitive products").

⁴⁸ U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA-230-11-083, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 9-3 (1990).

⁴⁹ *Id.* at 9-3, 9-10 and 9-21. See also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENT MONOGRAPHS NO. 38, POLLUTION CONTROL AND ABATEMENT EXPENDITURE IN OECD COUNTRIES: A STATISTICAL COMPENDIUM 40 (1990).

⁵⁰ IPDA, *supra* note 6, § 2(4).

states that, "the significance and serious competitive advantage enjoyed by . . . foreign competitors from cost savings derived from the absence of effective pollution controls results in cheaper foreign imports which capture United States market share and injure United States industries."⁵¹ The bill finds that this competitive advantage enjoyed by foreign competitors constitutes an environmental subsidy and is a barrier to international trade.⁵² The IPDA would impose a countervailing duty to offset what is perceived to be a subsidy deriving from the "failure to impose and enforce effective pollution controls and environmental safeguards"⁵³

B. *Countervailing Duties And Subsidies Under The GATT*

The IPDA's concepts of countervailing duties and subsidies are inconsistent with the GATT, a multilateral international trade treaty signed by 102 nations, as of June 1991.⁵⁴ The GATT's goal is the "substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce"⁵⁵ Article VI of the GATT, requires a country that wishes to impose a countervailing duty to first determine that the exporting country has granted a subsidy on the exported product.⁵⁶ In 1979, the contracting parties to the GATT provided procedures for determining subsidies and countervailing duties in the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (GATT Subsidies Code).⁵⁷

⁵¹ *Id.* § 2(6).

⁵² *Id.* § 2(7) ("[T]he failure of a government to impose effective environmental controls on production and manufacturing facilities within its borders should be recognized for what it is — a significant and unfair subsidy"). See also 137 Cong. Rec. S5298, 5299 (daily ed. Apr. 25, 1991):

[S]trictly regulating pollution within [the United States'] borders, while maintaining the largest and most open market in the world, can impair our competitiveness and provide unfair advantages to foreign competitors subject to less stringent or effective pollution control. Cheaper foreign goods carry a hidden price tag if they are produced free of meaningful environmental protection.

Id. (statement of Sen. Boren).

⁵³ IPDA, *supra* note 6, § 3(a) & (b).

⁵⁴ BASIC INSTRUMENTS AND SELECTED DOCUMENTS, SUPP. NO. 37, at X (1991) [hereinafter BIRD].

⁵⁵ GATT, *supra* note 2, Preamble.

⁵⁶ *Id.* art. VI:3.

⁵⁷ General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI and XXIII, April 12, 1979, 31 U.S.T. 513, 18 I.L.M. 579 [hereinafter GATT Subsidies Code].

The GATT Subsidies Code requires that a countervailing duty be imposed only pursuant to an "investigation to determine the existence, degree and effect of any alleged subsidy."⁵⁸ The investigation should "be initiated upon a written request by or on behalf of the industry affected"⁵⁹ to the Committee on Subsidies and Countervailing Duties (the Committee).⁶⁰ If the Committee determines that enough evidence exists to warrant an investigation to decide whether a subsidy exists, it shall notify all interested parties and issue a public notice regarding the investigation.⁶¹

As of September 1992, the United States has not requested an investigation into the existence of an environmental subsidy. Accordingly, the determination of whether a subsidy exists must fail because the United States failed to follow the proper procedures for determining a subsidy.

Even if the United States had requested an investigation, however, the Committee would probably have determined that a countervailable subsidy did not exist. Nothing in the history of subsidies supports the theory that the failure of one nation to impose and enforce the environmental protection standards of another nation constitutes a countervailable subsidy.

Article XVI of the GATT defines a subsidy as "any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory . . ."⁶² Unfortunately, neither the GATT nor the GATT Subsidies Code provides a clearer definition of a subsidy. However, by examining the effects of governmental income and price supports, a sense of what a subsidy is becomes clearer.

There are two types of subsidies: export subsidies and domestic or production subsidies.⁶³ Export subsidies are granted upon products only when they are actually exported. Professor Alan Sykes of the University of Chicago School of Law defines an export subsidy as, "any government program or practice that increases the profitability of export sales but does not similarly increase the profitability of sales for domestic consumption."⁶⁴ The GATT Subsidies Code provides some examples of

⁵⁸ *Id.* art. II:1, 31 U.S.T. at 519, 18 I.L.M. at 582.

⁵⁹ *Id.*

⁶⁰ *Id.* at fn. 5, 31 U.S.T. 519, 18 I.L.M. at 583.

⁶¹ *Id.* art. II:3, 31 U.S.T. at 520, 18 I.L.M. at 583.

⁶² GATT, *supra* note 2, art. XVI:1.

⁶³ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS*, 249 (1989).

⁶⁴ Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV.

export subsidies, none of which refer to a government's failure to institute effective environmental regulation and standards.⁶⁵

Domestic subsidies are granted regardless of whether the products are exported. "They involve a vast range and number of government policies, many of which are perfectly justifiable as exercises of sovereign activity within a country."⁶⁶ In order to be countervailable under the United States Tariff Act of 1930,⁶⁷ a domestic subsidy must specifically target an enterprise or industry, or group of enterprises or industries, and provide an advantage or opportunity to those producers that would normally not be available in the marketplace.⁶⁸

Based upon these clarifications, ineffective environmental protection standards could be a subsidy only if: 1) products manufactured for export were manufactured under lower environmental standards than the same products manufactured for domestic sale, or 2) a specific industry is exempted from environmental protection standards with which all other industries must comply (i.e., a nation's auto industry is exempt from sulfur dioxide emissions standards but all other steel-based industries must comply). If there is no subsidy, then the United States cannot impose a countervailing duty which is consistent with the GATT because the GATT Subsidies Code requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist"⁶⁹

The IPDA does not allege that either of these conditions exist. Rather, the bill finds that a subsidy exists because of a government's failure to act, and impose effective environmental standards.⁷⁰ The GATT could not have possibly intended to identify this failure as a subsidy. When the GATT was formed in 1947, there was not as much concern for the environment as there is at present.

Under current international law, a nation is not required to impose

199, 203 (1989).

⁶⁵ GATT Subsidies Code, *supra* note 57, Annex, 31 U.S.T. at 546, 18 I.L.M. at 615. Some examples of export subsidies include direct governmental support of an industry contingent upon export performance and lower transport and freight charges mandated by the government for domestic shipments.

⁶⁶ JACKSON, *supra* note 63, at 250.

⁶⁷ Tariff Act of 1930, 19 U.S.C. §§ 1202-1677k (1988).

⁶⁸ Tariff Act of 1930, § 771, 19 U.S.C. §1677(5)(A)(ii) (1988). *See also* Sykes, *supra* note 64, at 204.

⁶⁹ GATT Subsidies Code, *supra* note 57, art. IV:2, 31 U.S.T. at 523, 18 I.L.M. at 588 (footnote omitted).

⁷⁰ IPDA, *supra* note 6, § 2(7) ("[T]he failure of a government to impose environmental controls on production and manufacturing facilities within its borders should be recognized for what it is - a significant and unfair subsidy").

effective environmental protection standards, unless it is a party to a treaty which requires such imposition⁷¹ (i.e., the Montreal Protocol). A failure to impose effective environmental protection standards, absent a treaty, does not create a countervailable subsidy.

If the United States levies a countervailing duty under the IPDA, it would be in violation of the GATT. Article XIII of the GATT provides that "[n]o prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party . . . unless the importation of the like product of all third countries . . . is similarly prohibited or restricted."⁷² The IPDA would not regulate the importation of products in a manner consistent with Article XIII because the United States would levy a countervailing duty on the products of one country yet might not levy the same duty upon the products of another country.

If the IPDA were to become law and the United States levies a countervailing duty upon imports from a nation without effective environmental protection laws, that nation could successfully challenge the United States action before a GATT panel. Because the IPDA's novel definition of a subsidy would not survive a panel's strict scrutiny. The United States would be in violation of Article XIII of the GATT for imposing restrictions upon the importation of products depending upon the country of origin.

IV. THE AMENDED CLEAN AIR ACT AND THE GATT

A. *The Current Clean Air Act*

In its present form the Clean Air Act⁷³ requires the EPA Administrator to propose a national ambient air quality standard (NAAQS) for air pollutants which effect public health or welfare.⁷⁴ The NAAQS reflects the ratio of the pollutant to a specific volume of air. For example, the NAAQS for lead is 1.5 micrograms of lead per cubic meter of air, as the maximum arithmetic mean averaged over a calendar quarter.⁷⁵ The Administrator collects data on the effects of the pollutant on public health and welfare. From this data he or she calculates a standard, the

⁷¹ See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060 (In deciding international legal disputes, the Court considers, "(a) international conventions . . . establishing rules expressly recognized by the contesting states . . .").

⁷² GATT, *supra* note 2, art. XIII:1.

⁷³ Clean Air Act, 42 U.S.C. §§ 7401-7671q (1989 & Supp. 1992).

⁷⁴ *Id.* § 7409(a)(1)(A).

⁷⁵ National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. § 50.12 (1991).

attainment and maintenance of which, in his or her judgment, is required to protect the public health and welfare.⁷⁶ The standard must allow an adequate margin of safety.⁷⁷

The Administrator may commence a civil action against an owner or operator of a pollution source which violates the Act for a temporary or permanent injunction to cease the operation of the polluting source, or assess a penalty of up to \$25,000 a day for each violation, or both.⁷⁸ In extreme instances, the polluter may be imprisoned for up to 5 years.⁷⁹

B. *The Proposed Amended Clean Air Act*

This Note proposes a framework to amend the Clean Air Act in a manner which would protect the environment and be consistent with the GATT. Under the proposed Amended Clean Air Act (ACAA), the Administrator would promulgate a modified ambient air quality standard (MAAQS) for each pollutant for sources outside the jurisdiction of the United States. The MAAQS, like the NAAQS, would reflect a standard the attainment of which is necessary to protect the public health of the United States. However, the ratio of the MAAQS would be higher than the NAAQS, because the modified standard would have to consider the rate of dissipation of a pollutant before it enters the jurisdiction of the United States. Therefore, the MAAQS would have to also consider the distance from the source to the United States. A source two thousand miles away from the United States would necessarily have a less strict MAAQS than a source one thousand miles away due to dissipation.

If a manufacturer is found to violate the MAAQS, the importer of record⁸⁰ who imports the manufacturer's products to the United States would face any civil claims and penalties imposed by the ACAA. There would be no criminal penalties for violating the MAAQS or for importing from manufacturers who violate the MAAQS. The civil penalties would be assessed on a per unit basis, or the court could order a tempo-

⁷⁶ Clean Air Act, 42 U.S.C. § 7409(b).

⁷⁷ *Id.*

⁷⁸ *Id.* § 7413(b).

⁷⁹ *Id.* § 7413(c)(1).

⁸⁰ Tariff Act of 1930, 19 U.S.C. § 1484(a)(2)(C) (1988) defines the importer of record as "one who is eligible to file the documentation required by this section." The required documentation includes documents "necessary to enable [the customs] officer to determine whether the merchandise may be released from customs custody" *Id.* § 1484(a)(1)(A). Other required documentation includes documents "necessary to enable [the customs] officer to assess properly the duties on the merchandise, collect accurate statistics with respect to the merchandise, and determine whether any other applicable requirement of law . . . is met." *Id.* § 1484(a)(1)(B).

rary injunction. Nothing in the ACAA should be construed to prohibit the importer from passing on the effects of the civil penalties either to the customers, through higher prices or any other appropriate method, or to the manufacturer, through higher service fees or any other appropriate method.

The party with the burden of proof would be dependant upon the environmental protection standards of the manufacturer's country. If the manufacturer is situated in a country that has regulations as strict or stricter than the MAAQS, there would be a rebuttable presumption of compliance. Thus, the Administrator would have to prove that the manufacturer did not comply with the standard, using convictions against the manufacturer for the violation of his or her own national environmental laws, or data on the manufacturer collected by a reliable international environmental organization, as evidence of non-compliance.⁸¹

If the manufacturer is situated in a country that has regulations below the MAAQS or if the country has no such regulations at all, there would be a rebuttable presumption of non-compliance. The manufacturer could rebut by demonstrating that it is individually in compliance with the MAAQS despite the environmental protection standards of its country.

The MAAQS for a specific pollutant would be waived if the country has signed an environmental treaty regarding that pollutant to which the United States is a party (i.e., the Montreal Protocol).

The Administrator could use data collected by international environmental monitoring organizations, such as the World Meteorological Organization⁸² or Earthwatch,⁸³ when determining whether a manufacturer complies with the MAAQS. The Administrator could also use data collected by the manufacturing nation's government or the EPA if the foreign government consents to the EPA's monitoring.

⁸¹ See *infra* text accompanying notes 82-83.

⁸² See ALEXANDRE C. KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 67 (1991). The World Meteorological Organization "is particularly equipped to undertake global monitoring. It actively participated in the creation of a world system of continuous monitoring of the environment (GEMS) [Global Environmental Monitoring System], contributing enormously to the field of environmental protection." *Id.*

⁸³ See Stockholm Declaration, *supra* note 29. See also KISS & SHELTON, *supra* note 82, at 41, 60 & 151. Earthwatch was established in the *Action Plan for the Human Environment* as a global environmental assessment program, including evaluation and review, research, monitoring and information exchanges. *Id.* at 41. The program ensures continuous surveillance and is internationally financed. *Id.* at 151.

C. *The ACAA and the GATT Tuna Panel Report*

The ACAA addresses the growing concern that the United States', or any other nation's, domestic environmental protection laws could conflict with the GATT.⁸⁴ A recent example of an environmental law conflicting with the GATT is the United States Marine Mammal Protection Act⁸⁵ (MMPA).

In August 1991, a GATT panel ruled that the MMPA, which banned the importation of tuna harvested by Mexican fishers using purse-seine nets, sometimes referred to as "driftnets," violated the GATT.⁸⁶ Mexico challenged a provision of the MMPA which prohibited the importation of "fish or products from fish which have been caught with commercial fishing technology which results in the incidental killing of or serious injury to ocean mammals in excess of United States standards."⁸⁷ The statute requires the exporting country to provide documentary evidence that "the average rate of that incidental taking [of ocean mammals] by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting"⁸⁸ American vessels may receive a permit authorizing limited incidental taking of marine mammals.⁸⁹

⁸⁴ See *GLOBE Members, Experts Debate Effect of Free Trade on World Environment*, INT'L ENVTL. DAILY (BNA), Feb. 6, 1992 ("GATT would severely limit the ability of the United States, or any other country, to maintain higher safety and environmental standards than those that would be acceptable under GATT because such standards could restrict trade."); Sinfah Tunsarawuth, *GATT Chief Warns of Trade Conflict on Environment*, REUTERS, Jan. 23, 1992 ("GATT chief Arthur Dunkel said . . . that domestic environmental standards could lead to friction as trade partners took action to preserve their own environments."); Dunstan McNichol, *Trade Talks Have Environmental Overtones*, STATES NEWS SERVICE, Jan. 10, 1992 (GATT "could deal a fatal blow to environmental legislation"); Nancy Dunne, *Environment Rules Set Stage for GATT Conflicts*, FIN. TIMES, Dec. 5, 1991 at I6 [hereinafter *GATT Conflicts*] (United States Senator Max Baucus said "'GATT must recognise [sic] environmental protection as a legitimate objective of trade policy.'"); *GATT Revives Dormant Environment Panel to Ensure Commerce Views Heard at UNCED*, INT'L ENVTL. DAILY (BNA), Nov. 5, 1991 ("The World-wide Fund for Nature has called for a 'significant greening of GATT'"); Nancy Dunne, *U.S. Call for a GATT Code on Environment*, FIN. TIMES, Sept. 18, 1991, at I6 (Senator Baucus claimed there was "'an obvious deficiency' in the GATT which puts trade law above environmental considerations."); Hunt, *supra* note 3 (noting that the GATT "could hamper the growth of international agreements to curb industrial pollution and counter global warming.").

⁸⁵ Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1984 & Supp. 1992).

⁸⁶ Tuna Panel Report, *supra* note 1.

⁸⁷ Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2).

⁸⁸ *Id.* § 1371(a)(2)(B)(ii).

⁸⁹ *Id.* § 1373(a).

Mexican fishers employed purse-seine nets when harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean. This fishing technique resulted in the incidental deaths of dolphins, which frequently swim alongside schools of yellowfin tuna in that part of the Pacific Ocean.⁹⁰

1. Article XI

The Panel held that the MMPA violated Article XI of the GATT, which prohibits quantitative restrictions on imported products. Article XI:1 provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party”⁹¹ The Panel ruled that “the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1.”⁹²

The Amended Clean Air Act, proposed above, would not violate Article XI. Article XI speaks of quantitative restrictions on imported products from other countries. The civil penalties, which would be one of the “other charges” to which Article XI refers,⁹³ would not be assessed based upon the country of origin. The product’s original country is only considered when determining whether the manufacturer complied with the MAAQS. Nor do the civil penalties constitute a quantitative restriction. An importer remains free to import the same products found to be violative of the ACAA as long as the importer pays the civil penalties.

2. Article III

Mexico argued, *inter alia*, that the ban on tuna caught by Mexican fishers violated Article III of the GATT,⁹⁴ which provides that imported products shall receive the same regulatory treatment as like products produced domestically.⁹⁵ The Note Ad Article III provides that any “regulation . . . which applies to an imported product and the like do-

⁹⁰ George Lobsenz, *Administration Seeking Changes to Dolphin Protection Law*, UPI, Sept. 27, 1991, available in LEXIS, Nexis Library, UPI File.

⁹¹ GATT, *supra* note 2, art. XI:1.

⁹² Tuna Panel Report, *supra* note 1, at 1618.

⁹³ GATT, *supra* note 2, art. XI:1.

⁹⁴ Tuna Panel Report, *supra* note 1, at 1601, 1603-1605.

⁹⁵ GATT, *supra* note 2, art. III.

mestic product . . . is nevertheless to be regarded as a . . . regulation of the kind referred to in [Article III], and is accordingly subject to the provisions of Article III."⁹⁶ The GATT panel asked,

whether the tuna harvesting regulations could be regarded as a measure that 'applies to' imported and domestic tuna within the meaning of the Note Ad Article III and consequently as a measure which the United States could enforce consistently with that Note in the case of imported tuna at the time or point of importation.⁹⁷

The Panel noted that Article III applies only to products, not to the harvesting of the product. "[The Note Ad Article III] covers only measures applied to imported products that are of the same nature as those applied to the domestic products" ⁹⁸ The Panel concluded Article III does not apply to the MMPA.

[T]he Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.⁹⁹

The ACAA, like the MMPA, would not apply to the products as products. While the MMPA addressed the harvesting of the product, to which Article III is silent, the ACAA would address the manufacturing of products. Article III poses no barrier to the ACAA.

3. Article XX

In the Tuna case, the United States claimed that GATT Article XX(b) permits the United States to adopt measures, necessary to protect animal life or health.¹⁰⁰ The Panel disagreed.

⁹⁶ *Id.* Annex I.

⁹⁷ Tuna Panel Report, *supra* note 1, at 1617.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1618. However, the Panel fails to explain why it did not apply the "products as products" test when determining the MMPA's compliance with Article XI.

¹⁰⁰ *Id.* at 1606. See GATT, *supra* note 2, art. XX ([N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b)

The Panel held that the party invoking Article XX has the burden to demonstrate that the article's exception applies. "[T]he practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation."¹⁰¹ Therefore, the United States was required to justify the application of Article XX in the tuna case.

In determining whether the United States properly justified the application of Article XX(b) when banning the importation of Mexican-harvested tuna, the Panel asked "whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure"¹⁰² To address this issue, the Panel considered the drafting history of the Article and the Article's purpose. The Panel recognized that "the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."¹⁰³ The Panel concluded that Article XX(b) would not permit the United States to ban the importation of tuna harvested by Mexican vessels because the United States was attempting to institute measures outside of its territorial jurisdiction.

In arriving at its conclusion, the Panel noted that the Draft Charter of the International Trade Organization, a forerunner of the GATT, had a provision similar to Article XX(b).¹⁰⁴ One draft of the Charter's preamble permitted measures inconsistent with the Charter, "[f]or the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing state."¹⁰⁵

The Panel found further persuasive authority in an earlier GATT panel ruling. In declaring that Thailand's restriction on the importation of cigarettes was permissible under the GATT, the earlier panel held that Article XX(b) permitted a contracting party to "impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable."¹⁰⁶

necessary to protect human, animal or plant life or health").

¹⁰¹ Tuna Panel Report, *supra* note 1, at 1619.

¹⁰² *Id.*

¹⁰³ *Id.* at 1620.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (from the New York Draft of ITO Charter).

¹⁰⁶ Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel adopted Nov. 7, 1990 (DS10/R), BISD, 37th Supp. *supra* note 54, at 223, DS10/R, para 74 (1991).

The Tuna Panel ruled that the unavoidable inconsistencies must be necessary in order to be included in the Article XX(b) exception.¹⁰⁷ The Panel then concluded that the tuna ban was not necessary because the United States permitted limited incidental killing. The Panel reasoned that because the United States required Mexico to demonstrate that the Mexican rate of incidental taking of dolphin was comparable to the United States' rate,¹⁰⁸ and that Mexico could not know whether, at any specific time, its taking rate conformed with the United States' policy until the time period expired, such "a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins."¹⁰⁹

The United States might also be required to invoke Article XX in case a contracting party challenges the ACAA as an unfair barrier to trade. Under the ACAA, corresponding domestic environmental safeguards would exist in the United States. Domestic manufacturers must comply with NAAQS implementation plans. The NAAQS is necessarily a stricter standard than the MAAQS for the former does not consider dissipation of the pollutant outside of the United States. There are also stricter regulations for monitoring domestic plants. Foreign manufacturers are monitored by either their own government, which is under no obligation to release its data to the United States, or international environmental groups, which usually do not focus on monitoring a single plant.

Additionally, the parties to the Montreal Protocol used GATT Article XX(b) as a method to permit trade restrictions on CFCs.¹¹⁰ A GATT legal expert affirmed that the parties were properly invoking the health protection measures embodied in that Article.¹¹¹

The ACAA would withstand strict scrutiny under Article XX(b). American manufacturers must comply with the same environmental protection standards as foreign manufacturers. The ACAA protects the environment within the jurisdiction of the United States. Finally, a GATT legal expert has found that nations may invoke Article XX(b) to protect its environment.

¹⁰⁷ Tuna Panel Report, *supra* note 1, at 1620.

¹⁰⁸ Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(B)(ii).

¹⁰⁹ Tuna Panel Report, *supra* note 1, at 1620.

¹¹⁰ BENEDICK, *supra* note 22, at 91.

¹¹¹ *Id.*

D. *The ACAA, Countervailing Duties and Subsidies*

1. The ACAA is not a Countervailing Duty

According to the GATT Subsidies Code, in order for a contracting party to classify the proposed Amendments as a countervailing duty, the United States would first have to establish that the lower environmental protection standards of other countries constitute a subsidy.¹¹² The United States would then have to demonstrate that the subsidy injured the United States market for domestic industry. The GATT Subsidies Code defines "domestic industry" as "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total production of those products."¹¹³ The duty which the United States levies upon products must be proportional to the benefit those products receive from the exporting country because Article VI of the GATT requires that:

[n]o countervailing duty shall be levied on any product . . . in excess of an amount equal to the estimated bounty or subsidy determined to have been granted . . . in the country of origin or exportation The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.¹¹⁴

The ACAA would not consider the economic benefit received by the exporting country from their lower environmental protection standards. The ACAA would not consider economic interests at all. The United States would examine the environmental protection laws of other contracting parties to judge how those laws affect the United States' environment, not international trade or American industries. Because the United States would not be considering whether a subsidy exists, the ACAA does not constitute a countervailing duty.

Additionally, the decision to assess a civil penalty under the ACAA would rest with a United States judge. In contrast, a decision to levy a duty rests with the Secretary of the Treasury.¹¹⁵ The judge would have to consider whether the manufacturer violated our environmental laws before assessing a penalty. The Secretary of the Treasury, by contrast,

¹¹² GATT Subsidies Code, *supra* note 57, art. II:1(a), 31 U.S.T. at 519, 18 I.L.M. at 582.

¹¹³ *Id.* art. VI:5, 31 U.S.T. at 528, 18 I.L.M. at 594.

¹¹⁴ GATT, *supra* note 2, art. VI:2, 31 U.S.T. at 527, 18 I.L.M. at 593.

¹¹⁵ Tariff Act of 1930, 19 U.S.C. § 1303(b). The Secretary of the Treasury is the administering authority which prescribes countervailing duty regulations. *Id.* § 1677(1).

would only consider the economic impact of the subsidy on the foreign industry and levy a duty equal to the amount of the subsidy.¹¹⁶

2. The ACAA is not a Subsidy

The ACAA would not constitute a subsidy to United States manufacturers. Although the ACAA could indirectly reduce imports of the number of products, it would not reduce the number of products imported as products. The GATT panel in the Tuna Case carefully distinguished regulations affecting products as products and regulations affecting the harvesting or manufacturing of products.¹¹⁷ The Panel held that harvesting or manufacturing regulations are not affected by GATT Article III.¹¹⁸

The same reasoning may be applied to GATT Article VI. That Article addresses the subsidy of products as products. The Article does not address the manufacturing of products. For example, suppose all widget manufacturers in the United States used the least expensive manufacturing method, while no other contracting party used that method. The method would not constitute a subsidy despite the fact that the demand for imported widgets would probably be reduced.

The ACAA does not bestow a benefit upon United States industries. It only examines the environmental impact of foreign industries that export to the United States.

The ACAA would not conflict with the GATT. A GATT panel would probably rule that because the ACAA would not regulate products as products, it would not violate Articles III or XI. The ACAA would not constitute either a subsidy or a countervailing duty. Even if a GATT panel concludes that the ACAA would be inconsistent with these provisions, the United States could claim that the ACAA would be permitted under Article XX(b) as a necessary measure to protect public health.

CONCLUSION

Despite environmentalists' concerns regarding the GATT Tuna Panel ruling, that decision does not prohibit nations from passing environmental protection standards for imports. The decision merely sets the boundaries which no nation may exceed.

The IPDA would violate those boundaries. It creates a new defini-

¹¹⁶ *Id.* § 1303(a).

¹¹⁷ *See supra* text accompanying notes 95-99.

¹¹⁸ *Id.*

tion for a subsidy, one that is unlikely to survive strict GATT scrutiny. Although it purports to protect the environment, the Act considers only economic factors when imposing a countervailing duty.

In contrast, the ACAA would survive strict GATT scrutiny. It would be neither a countervailing duty or a subsidy. It would not conflict with any GATT measures. If a future GATT panel were to rule that the ACAA does violate a GATT measure, nevertheless, the ACAA would still be permitted for it legitimately protects public health. The ACAA would be an effective environmental control measure that complies with the GATT.

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